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September 9, 2011

Delivered by Email

Ms. Kirsten Walli, Board Secretary
Ontario Energy Board
2300 Yonge Street
Suite 2701
Toronto ON M4P 1E4

Dear Ms. Walli:

Re: CANDAS Application - OEB File No.: EB-2011-0120

We write on behalf of Toronto Hydro-Electric System Limited ("THESL") in response to the Board's letter dated September 7, 2011 (the "Board Letter") and the letter from CANDAS' counsel of the same date (the "CANDAS Letter").

THESL accepts that pursuant to the Board Letter, the Board intends to: (a) treat THESL's affidavit evidence as intervenor evidence in the main CANDAS Application proceeding; (b) maintain, to the extent possible, the existing process and timelines for hearing the CANDAS Application as articulated in Procedural Order No. 2; and (c) hold THESL's Notice of Motion in abeyance until the CANDAS Application is heard and determined.

As a general matter and regarding (a), THESL advises the Board that it does not intend to withdraw any of its intervenor evidence at this time and intends to present a witness panel in support of this prefiled evidence.

The Scope of the Proceeding and Sequencing

While THESL accepts that the Board has elected to hold THESL's motion as filed on September 2, 2011 in abeyance, it is nevertheless of the view that the two types of issues in this proceeding raise important sequencing questions. The two types of issues are:

- (a) "threshold" issues, which can be determinative of the entire proceeding, or determinative of which secondary issues are relevant to the next phase of the proceeding. Threshold issues include whether the CCTA Decision applies, whether the Board will amend distributors licences as requested in the CANDAS Application, and whether the Board should forbear in this matter pursuant to subsection 29(1) of the *Ontario Energy Board Act, 1998*; and

- (b) “secondary” or “contingent” issues, which would only become relevant if the Board finds that the threshold issues are not entirely determinative of the proceeding. They include what the terms and conditions of access would be, and what an appropriate pole access rate would be.

The existence of these two types of issues raises the question of whether a bifurcated proceeding may be the most appropriate method by which to dispose of this matter. THESL accordingly seeks the Board’s direction in respect of both the issues to be included in this proceeding, and the sequencing of those issues, including whether a phased proceeding is appropriate.

CANDAS seeks to have the Board determine “terms and conditions” that apply to wireless attacher’s access to LDC poles, but this issue would only be relevant in the event that the Board first finds that the CCTA Decision applies to wireless attachments or decides to otherwise regulate wireless attachments, and determines not to forbear. Also, while CANDAS takes the position that “[n]o party has requested the Board to review and vary the regulated pole access rate”¹ and therefore any such information is not relevant to the issues raised in the Application, THESL is of the view that any proceeding (or part of a proceeding) that focuses on terms and conditions of access is necessarily connected to the issue of the appropriate rate which governs that access.

While the issue of terms and conditions of attachment including rates will only become relevant if the Board makes the findings as discussed above, THESL will need to make submissions on the appropriate terms and conditions, including rates, prior to the Board making a determination of them. THESL is prepared to submit a new application to the Board regarding the terms and conditions including rates which should be applicable to wireless attachments. THESL would only seek to pursue this new application in the case that the Board makes such a finding.

However, THESL remains concerned that if the CANDAS Application is dismissed or the relief sought by CANDAS is otherwise not granted by the Board, then had THESL already brought an application to change access rates, this would represent significant wasted resources and effort.

The alternative would be for the Board to allow for further applications and evidence on the contingent issues if the Board’s findings on the threshold issues make a determination of the contingent issues relevant.

Thus, THESL is of the view that the two types of issues in this proceeding raise important sequencing issues, including whether a phased proceeding may be the most appropriate and prudent method by which to dispense of this matter. THESL accordingly seeks the Board’s direction in respect of the most appropriate procedural path, including whether a phased proceeding is optimal.

Should the Board decide to include the issue of new attachment rates in this proceeding, THESL requests that the Board make provision either for a stay of implementation of its decision on the CANDAS Application or allow for a further phase of this proceeding to enable parties to bring new evidence or application(s) as appropriate to determine appropriate attachment rates in light of the Board’s ruling on access for wireless attachers.

¹ See, for instance, CANDAS Response to THESL IR#18(b).

The Issues List

As noted above, and in light of the complexity of the various issues raised by the CANDAS Application, THESL seeks the Board's direction to clarify exactly what matters are at issue and within the scope of this proceeding.

THESL filed its notice of motion to underscore a number of important threshold issues of relevance to the CANDAS Application. In the Board Letter, the Board indicated that the applicability of the CCTA Decision is already a matter at issue in the CANDAS Application and THESL agrees that this is a central issue to be decided by the Board.

However, in light of CANDAS' refusals to answer THESL's interrogatories directed at assessing whether distribution poles are in fact "essential facilities" for wireless attachments (which goes to the applicability of the CCTA Decision),² it is not clear to THESL that all of the parties in this proceeding are in agreement on what matters are at issue in this proceeding.

In view of these concerns, THESL is also requesting the Board to direct Board Staff to prepare an initial Issues List for review and comment by all parties. The Board's existing process as articulated in Procedural Order No. 2 contemplates the issuance of an Issues List prior to the commencement of the Settlement Conference. Specifically, Procedural Order No. 2 provides:

"A Settlement Conference will be convened on Friday, September 30, 2011, at 9:30 a.m. with the objective of reaching a settlement among the parties on as many of the issues on the Issues List as possible."

The Issues List will facilitate discussions during the Settlement Conference and a more focused oral hearing. The Issues List will clarify for all of the parties what exactly the Board intends to address as part of the oral phase of this proceeding.

THESL submits that the Issues List should include the following issues raised by THESL in its prefiled evidence:

(a) "Essential facilities"

Whether distribution poles constitute "essential facilities" for wireless attachments, which is a central factual issue in this proceeding and is directly relevant to assessing whether or not the CCTA Decision applies.

(b) Differences between wireline and wireless attachment

The differences between wireline and wireless attachments, which represent another central factual issue in this proceeding and are directly relevant to assessing whether or not the CCTA Decision applies. Among other differences, the question of whether or not wireless attachments fit within the Board approved "communications space" on LDC poles is a central factual issue in this proceeding and is directly relevant to assessing whether or not the CCTA Decision applies.

² The specific IR responses of concern are fully documented in THESL's motion materials and are not repeated here.

These differences may raise legitimate concerns about the appropriateness of the rate set in the CCTA Decision, which as noted above, THESL intends to raise by way of a separate application once the threshold issues are determined.

(c) Forbearance

THESL acknowledges the Board's determination that it would be premature to determine the issue of forbearance pursuant to subsection 29(1) of the *Ontario Energy Board Act, 1998* at this time through a motion. However, THESL submits that the issue of forbearance should properly be included in the Issues List for the CANDAS Application so that all of the parties can make submissions on this matter and the Board can determine this issue as part of the CANDAS Application, if necessary.

Summary

In light of the concerns raised above, THESL notes that the following four outcomes could emerge from the current proceeding:

- a) The Board decides that the 2005 CCTA Decision does not apply to wireless attachments and the Board decides not to otherwise regulate the access of wireless attachments in favour of letting the competitive siting market function as it does now, in which case the CANDAS Application is dismissed;
- b) The Board decides to forbear in this case because there is or will be competition sufficient to protect the public interest;
- c) In the event that the Board elects a phased process and decides in "phase I" that it will regulate access and rates for wireless attachments, a "phase II" of the proceeding occurs during which the Board considers the terms and conditions that should govern such access, and if appropriate, THESL's (and perhaps others') application for new attachment rates; or
- d) In the event that the Board declines to pursue a phased process or does so but excludes applications for new attachment rates from that process, and the Board decides that it will regulate access and rates for wireless attachments, the Board would stay the implementation of this decision pending the determination of a new application by THESL (and perhaps others) to increase attachment rates.

In summary, THESL requests the Board's direction on the following:

- 1. What issues will be settled in this proceeding? THESL is requesting that the Board direct Board Staff to prepare and circulate a draft Issues List;
- 2. In what sequence the Board will hear the approved issues? THESL submits that a phased or otherwise bifurcated procedure is most appropriate for this proceeding; and
- 3. In what procedural manner will the Board determine any rates that may apply? THESL requests that if the Board elects not to include applications for new attachment rates as

part of the current proceeding (whether phased or not), implementation of any finding in this proceeding made by the Board to the effect that wireless attachers are to have pole access be stayed until an application to adjust the pole attachment rate to reflect the mandated access for wireless attachers has been heard and determined by the Board. In this regard THESL would undertake to file such an application as expeditiously as possible.

CANDAS' Notice of Motion on Intervenor Evidence

THESL and the CEA were the only intervenors to file evidence in this proceeding. In the CANDAS Letter, counsel for CANDAS has indicated its intention to raise by way of motion at the outset of the hearing objections to unnamed parts of this evidence, but has offered no details in this regard other than alleging that some of the evidence is inadmissible on the basis that it goes to the "ultimate issue" to be decided by the Board in the CANDAS Application.


In administrative proceedings in front an expert tribunal like the Board, there is little risk of confusing the Board panel about, on the one hand, what the "ultimate issue" that is within its authority to decide is, and on the other, what facts are within an expert's authority to draw conclusions and opine on. As a result, while the Board typically accepts submissions on the weight to be given to different evidence, it rarely strikes evidence as inadmissible.

CANDAS seeks an extraordinary remedy to have as of yet undisclosed portions of the THESL evidence ruled as inadmissible. THESL submits that CANDAS should be required to identify the specific evidence of concern and to provide grounds for such a ruling in writing well in advance of the commencement of the Technical Conference. THESL is entitled to understand the specifics of those allegations so that it can prepare to respond. Given that the Board has only set aside two days for the oral phase of this proceeding, it would not be an efficient or effective use of valuable hearing time to be presented, for the first time, with the nature and details of CANDAS' objections at the commencement of the oral hearing.

THESL therefore requests that the Board require CANDAS to provide the specific details of its motion identified in the CANDAS Letter in a timely fashion. CANDAS has access to all of the relevant evidence and has provided no reason why it could not provide this information in a more timely manner (indeed, CANDAS suggested that it could do so if directed by the Board).

Yours very truly,

BORDEN LADNER GERVAIS LLP



J. Mark Rodger

copy to: Pankaj Sardana and Amanda Klein, THESL
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